No. 22240

United States
COURT OF APPEALS
for the Ninth Circuit

HENRY E. McDOWELL,

Plaintiff,

v.

AMERICAN MAIL LINE, LTD.,
a corporation,

Defendant-Appellee,

FIREMAN'S FUND INSURANCE COMPANY,

Intervenor-Appellant.

Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, District Judge

BRIEF OF APPELLEE, AMERICAN MAIL LINE, LTD.

FILED

DEC 18 1967

WM. B. LUCK CLERK

WILLIAM F. WHITE,
WHITE, SUTHERLAND & GILBERTSON
1200 Jackson Tower
Portland, Oregon 97205
Attorneys for Appellee, American Mail Line, Ltd.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-67

JAN 1968

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BRIEF OF APPELLEE, AMERICAN MAIL LINE, LTD.

With plaintiff Henry E. McDowell having abandoned his appeal this case remains as one where Appellant-Intervenor, Fireman's Fund Insurance Company (hereafter, "Fireman's Fund") is appealing from findings of fact, conclusions of law and judgment rendered in favor of Appellee-Defendant, American Mail Line, Ltd. (hereafter, "American Mail"). American Mail agrees with Fireman's Fund's jurisdictional statement.

SUPPLEMENTARY STATEMENT OF THE CASE

To supplement and clarify Fireman's Fund's statement of the case American Mail adds:

The District Court upon trial of the segregated issue (from which appeal was taken) made the following

FINDINGS OF FACT

"1. The Court incorporates by this reference the agreed facts set forth on pages 2, 3 and 4 of the pretrial order upon segregated issue on claim for reimbursement.

"2. That the alleged supplemental contract between defendant and intervening claimant modifying the insurance agreement is so indefinite and uncertain as to be completely unenforceable.

"3. That even if such contract was sufficiently definite for enforcement, the same would tend to change, modify and contradict the terms of the insuring agreement.

"4. The alleged agreement mentioned by the witness Libby, even if definite would apply only on a policy to policy basis, and, therefore, unenforceable as to this particular policy.

"5. That the alleged claim is not a proper third party claim in this action and the Court would exercise its discretion against permitting the prosecution of the claim in this proceeding."

and the following

CONCLUSIONS OF LAW

> "Based upon the foregoing findings, the Court concludes that the petition of intervening claimant for intervention should be denied and the claim for reimbursement dismissed."

A further fact is that neither in its motion to intervene (R. 8) or its claim for reimbursement (R. 10) or the carefully worked out pretrial order upon the segregated issue (R. 14) did Fireman's Fund claim or contend that an oral agreement existed pertaining in any way to modification or supplementation of the insurance policy.

It was agreed as a fact that the deductible amount which American Mail would be required to pay before any insurance responded to the claim of longshoreman McDowell was an amount in excess of Fireman's Fund's claim of $6,693.45.

The insurance policy provided, among other things, that Fireman's Fund would "pay promptly to any person entitled thereto, under the Workmen's Compensation Law and in the manner therein provided, the entire amount of any sum due, and all installments thereof as they become due"; the "Workmen Compensation Law" referring to the Longshoremen's and Harbor Workers' Compensation Act, 28 U.S.C.A. § 901 et seq. (hereafter the "Act"). All of the provisions of the Act were made a part of the policy "as fully and completely as if written" in the policy (R. 14, Ex. 1).

The "Subrogation" Clause of the policy provided:

> "K. The company shall be subrogated in case of any payment under this policy, to the extent of such payment, to all rights of recovery therefor vested by law either in this employer or in any employee or his dependents claiming hereunder, against persons, corporations, associations or estates." (R. 14, Ex. 1).

Section 33 of the Act (28 U.S.C.A. § 933) reads in part:

> "(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.
>
> ". . . . .
>
> "(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section."

SUMMARY OF ARGUMENT

The District Court did not err in denying Fireman's Fund's intervention and claim for reimbursement and treating benefits paid under the Act to McDowell in accordance with this Court's holding in *Grace Line* v. *Kanton*, (9 Cir., 1967) 366 F.2d 510, certiorari denied January 9, 1967, 385 U.S. 1007.

Because longshoreman McDowell was suing his employer *in personam* and not some other person, Fireman's Fund's rights could not be equated with its rights had McDowell sued a third party. No law or contract supported the intervening claim of Fireman's Fund. Handling compensation benefits paid a longshoreman under the Act (33 U.S.C.A. § 901 et seq.) as sanctioned in *Kanton*, supra, did not create unjust enrichment or windfalls as claimed by Fireman's Fund but rather prevented them.

The District Court did not err in rejecting oral testimony which sought to establish an agreement between American Mail and Fireman's Fund to treat a two-party case as a three-party case. Not only was the proffered testimony beyond the issues of the intervention but tended to vary the terms of the written insurance policy.

ARGUMENT

American Mail was not a person other than the employer of McDowell and hence neither the Act nor the insurance policy entitled Fireman's Fund to claim reimbursement.

On this appeal Fireman's Fund is complaining that longshoreman McDowell was not awarded more than he was entitled to so that it could assert a lien on the excess. Otherwise put, Fireman's Fund contends the District Court erred in following this Court's decision in *Grace Line* v. *Kanton*, (9 Cir., 1966) 366 F.2d 510, certiorari denied in 385 U.S.

1007 (1967). In that case this Court approved the deduction from a longshoreman's recovery that which was paid to him by way of compensation benefits and refused to include in such recovery medical expenses not incurred by the longshoreman.

In this case McDowell sued American Mail, his employer *in personam* to recover damages for personal injuries arising from the unseaworthiness of defendant's vessel. Such action was sanctioned by this Court in *Pacific Inland Navigation Co.* v. *Course*, (9 Cir., 1966) 368 F.2d 540, certiorari denied March 13, 1967 in 386 U.S. 963.

The intervention and claim of Fireman's Fund could only depend upon its insurance policy and the Act incorporated into the terms of its policy. Neither support its claim.

The Act gives Fireman's Fund as a compensation insurance carrier a right of subrogation only in the case where the longshoreman seeks recovery from "some person other than the employer," 33 U.S.C.A. § 933. The fact that American Mail owned or operated the vessel upon which McDowell was injured does not alter the fact of employment. As we see it, no fact in this case can be tortured so as to make American Mail a person other than the employer of McDowell.

As to the insurance policy it must be considered in the light of the Act which was expressly incorporated therein. Taken by its four corners the Act is basically one requiring American Mail as an em-

ployer to pay compensation benefits to its employees on a no-fault basis. It is American Mail, as employer and not Fireman's Fund as carrier who is liable for the payment of benefits under the Act (33 U.S.C.A. § 904); to whom receipts for payment shall be given (33 U.S.C.A. § 914 (1)); to whom notice of injury or death shall be given (33 U.S.C.A. § 912); by whom injury or death shall be reported (33 U.-S.C.A. § 930); and who shall secure the payment of compensation by insuring and keeping insured such payments (33 U.S.C.A. § 932 (a)). It is this Act which required American Mail Line to take out this policy of insurance; the policy which obligated Fireman's Fund to pay promptly the entire amount of any sum due by American Mail to longshoreman McDowell.

The policy in its "Subrogation" clause "K" gave Fireman's Fund a right to become subrogated in this case to all rights of recovery vested by law in either American Mail or McDowell and against any persons, corporations, associations or estates. While the express language "some person other than the employer" is not used in the policy as in Section 33 of the Act the subrogation clause could scarcely mean anything else.

Certainly, McDowell had no right vested by law in himself to be paid damages without regard to having set off from those damages compensation payments which he had already received. Fireman's Fund by stepping into the shoes of McDowell could

have no greater right than McDowell. Likewise, it is rather ridiculous to conceive that American Mail had a right vested in law to collect money from itself or that Fireman's Fund by stepping into its shoes could have any greater rights. Neither law nor contract required the District Court to create a fund so that Fireman's Fund might impress a lien upon it for purpose of reimbursement.

The sole thrust of Fireman's Fund is based upon the proposition that American Mail is some other person than the employer of longshoreman McDowell. This proposition is contrary to the agreed fact (R. 14).

In a rather oblique approach Fireman's Fund seeks to make American Mail a third party target for McDowell's action by claiming that an application of the doctrine of *Reed* v. *SS YAKA*, (1963) 373 U.S. 410 requires it. Counsel for Fireman's Fund knows better. It was only last year that counsel for Fireman's Fund as attorney for Appellant in *Pacific Inland Navigation Co.* v. *Course*, (9 Cir., 1966) 368 F.2d 540 contended that the *in rem* action in *Yaka* was in reality a three-party situation and not authority to sanction this very type of case brought there by Course and here by McDowell directly against a ship-owner employer. Also, counsel for American Mail appeared in the *Course* case for amici curiae and joined appellant in the same contention. We both went down in defeat. In the *Course* case this Court not only refused to see a three-party sit-

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Another surprising contention is made by Fireman's Fund though under the wrong heading of its brief. On page 17 of its brief Fireman's Fund urges that the Supreme Court in *Yaka* by its rationale separated ownership liability from employer liability of the defendant and hence it would be logical for this Court to extend that concept by treating American Mail as having a dual personality. We do not read *Yaka* as does Fireman's Fund. The most we see in *Yaka* is that the longshoreman urged that it had only sued the ship *in rem* and not the shipowner employer and that he should recover against the ship irrespective of any personal liability on the part of the shipowner. It was this "personification of the ship" contention that the Supreme Court found unnecessary to decide. However, Mr. Justice Harlan, in a footnote to his dissenting opinion (373 U.S. 410 at 419) made it clear that the "personification of the ship" concept, if it ever existed, was long out of style. We quote in part from the footnote:

> ". . . The reason against its application to create substantive liability was eloquently stated by Mr. Justice Bradley, speaking for the Court

> in *The City of Norwich*, 118 U.S. 468, 503: 'To say an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. . . . In the matter of liability, a man and his property cannot be separated . . .' "

With the Supreme Court apparently being of the view that for liability reasons a ship cannot be divorced from her owner, it scarcely appears that it would be of a mind to fictionally split the corporate entity so that simultaneously it could have an owner-liability and an employer-nonliability. Besides, any fiction to make American Mail in whole or in part someone else other than the employer of McDowell would be repugnant to the agreed fact.

The woes of American Mail were brought about by this Court in *Course* stripping it of the protection against direct action by an employee that it always considered it had under Section 105 of the Act (33 U.S.C.A. § 905). It reached its result by refusing to see in *Yaka* a three-party situation. Consistency and fairness should leave American Mail in the two-party situation where this Court placed it unless the *Course* decision is to be undone. It should be too late for this Court to be influenced by the argument of Fireman's Fund that a simple, workable and sound policy is to now treat American Mail as a person other than the employer in order to enable Fireman's Fund to recoup insurance policy payments as it does in third-party actions. Such a policy would be far from simple as it would destroy the right of Amer-

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There is no justification for this Court to change its decision in the Kanton case.

The District Court did not err in following this Court's decision in *Grace Line* v. *Kanton*, (9 Cir., 1966) 366 F.2d 510, certiorari denied in 385 U.S. 1007 (1967). In *Kanton* this Court approved the District Court deducting from what it would otherwise award a longshoreman the amount he had already received by way of compensation under the Act from his defendant-employer. Where the longshoreman's medical expenses were incurred and paid for by the employer and not the longshoreman they were not included in the longshoreman's award.

While this simple method of insuring that the longshoreman is not unjustly enriched cannot be employed where the longshoreman is suing a person other than his employer, this, in itself, is no reason for not using this direct method where he is suing his employer. The charm of the method is that unjust enrichment is guarded against within the confines of the parties and issues of the longshoreman's action. Since it is the employer and not his insurance carrier who is liable to pay benefits under the Act there is no reason why a District Court should become obligated to broaden issues or decide collateral matters between the defendant-employer and one or more of its insurance carriers.

In attacking the wisdom of *Kanton*, Fireman's Fund argues that this Court went too far in that it gave American Mail credit for compensation payments but not for medical payments. From this it argues that had American Mail been a third-party, McDowell would have been given a full award and then be required to repay to American Mail both compensation and medical benefits and for that reason McDowell secured a windfall. We disagree. Under *Kanton*, McDowell was compensated only for his actual money loss. With his award offset by compensation previously received and his not being paid for medical expenses which he had not incurred McDowell received no windfall and hence had nothing to pay back. Because Fireman's Fund made the payments for American Mail instead of American Mail making the payments as required by the Act and then being reimbursed by Fireman's Fund under the policy is of no significance so far as McDowell or American Mail is concerned.

However, a more involved windfall argument is made by Fireman's Fund in respect to American Mail and its P & I insurance carrier. It appears that the first $10,000.00 of McDowell's $42,447.03 award was paid by American Mail and the balance by its P & I insurance carrier. The District Court denied repayment to Fireman's Fund of the $6,693.45 which it paid on behalf of American Mail for compensation and medical benefits because such was not included in McDowell's award.

Who of the three losers: American Mail, Fireman's Fund, or the P & I insurance carrier, gained a windfall? If the $6,693.45 "credit" was taken off the bottom of the $42,447.03 American Mail did not have to pay a full $10,000 and if taken off of the top, the P & I underwriter was saved paying what it would otherwise possibly have paid had American Mail been a third-party. However, there is another side of the coin. Had the matter been handled with American Mail as a third party, Fireman's Fund would have recouped its $6,693.45, but since American Mail was not in reality a third party it would be Fireman's Fund which gained a windfall to the full extent of its recoupment. Neither the Act nor the policy contemplated recoupment of money paid under the policy for American Mail or that recoupment could be had at the expense or detriment of its insured.

Moreover, if the P & I carrier's position is viewed as that of insuring American Mail as a third-party shipowner, we find it not gaining a windfall, but rather losing along with American Mail the right to be indemnified under *Ryan* by McDowell's employer. Since the Fireman's Fund policy insured American Mail as McDowell's employer, including any contractual right-over liability to a third person (Endorsement No. 12 to policy), Fireman's Fund would have written a check for the full $42,477.03 as well as defense expense. In short, in the case below the only one for certain who is gaining a very substantial windfall by the District Court following *Kanton*

is Fireman's Fund; the very person who is pointing its "windfall" fingers at others.

Nor, should the *dicta* in *Biggs* v. *Norfolk Dredging Company*, (4 Cir., 1966) 360 F.2d 360 persuade this Court to change its position in the *Kanton* case. We say *dicta* because the question as before this Court in *Kanton* was not before the Court of Appeals for the Fourth Circuit for decision. The *Biggs*' case was actually two consolidated appeals by workmen who had in different situations applied to state compensations commissions for compensation, claiming they were not seamen. Thereafter, each brought an action against their respective employers in the District Court claiming each was either a "Jones Act" or a "Sieracke" seaman. The District Court summarily dismissed both cases. The Court of Appeals reversed, holding that each workingman was not estopped by having made application for compensation from going to trial and establishing, if he could, his actual seaman status. It was only in such context that the Court, in order to show no incompatability between the compensation scheme and court action, observed how the problem of compensation payments *might* be handled. The Court merely stated that *if* the workingmen were successful in their litigation the defendant in each case "may retain from the judgment the sums necessary to reimburse the compensation carrier." No holding was made to require the matter to be handled as suggested.

This Court should adhere to its *Kanton* decision

and leave the insurance companies exactly where their carefully drafted insurance policies place them. They are thoroughly capable through policy endorsements or the adjustment of premiums to take care of themselves and make equitable contractual arrangements in light of *Kanton.*

District Court did not err in rejecting testimony of oral agreement; its findings that such was too indefinite, varied terms of the policy and beyond issues was not clearly erroneous.

Over objection of American Mail, Mr. Libby of Fireman's Fund testified that there was an agreement between American Mail and the Fireman's Fund that "these YAKA cases" would be handled the same as a third party case (Tr. 12, 14). The District Court's findings of fact that: (1) such alleged agreement was too indefinite to be enforceable; (2) would tend to change, modify or contradict the terms of the insurance policy; (3) could not be applicable to the specific policy; and (4) not properly the basis for the third party claim in intervention (R. 29) were supported by the evidence and were not clearly erroneous.

American Mail upon opening statement objected to the proof of an oral agreement claiming surprise in view of such contention not being set forth in the pre-trial order and further that if such oral agreement existed it should be litigated in a separate action (Tr. 7-8). It also objected to the evidence being admitted (Tr. 12).

As to this oral agreement no evidence was introduced to show between what individuals it was made, or when or where it was entered into. Further, it lacked certainty in that it failed to show how the parties had agreed, if at all, to handle any right-over for indemnity if American Mail was to be treated as a third party shipowner while the same American Mail was to be treated as McDowell's employer. These among other things made the evidence of the agreement too uncertain for enforcement.

The alleged oral agreement varied the term of the policy whose subrogation clause coupled with Section 33 of the Act (28 U.S.C.A. § 933) authorized recoupment through subrogation which could only be had against persons other than the insured.

The alleged oral agreement appears to have been made before the present policy was written, although it is vague in this respect. If so, it could not affect the present written policy which would have superseded any prior understandings. Of significance here is that Endorsement No. 12 to the policy (R. 14, Ex. 1) was an undertaking in writing to interpret and clarify a portion of the policy. If any oral agreement had previously existed it should have been incorporated into the policy while Endorsement No. 12 was in the making. Upon the offer of proof, Mr. Libby conceded such could have been done but was not done (Tr. 24).

The most that Fireman's Fund "Agreement" contention (p. 12) in its brief establishes is that its in-

itial "Intervention" contention (p. 6) is found wanting in merit. Neither the Act nor policy established American Mail as a third party. Likewise, Fireman's Fund failed to establish such status for American Mail by an oral agreement.

On this appeal American Mail takes the same position as it did at the trial. On opening statement its counsel stated (Tr. 7):

> ". . . I see nothing in the insurance policies which have been exhibited that there is some agreement. My answer to that is that if there is an agreement it is something that American Mail Line will honor just as much as Fireman's Fund will honor, but it has no place in this case."
>
> "This started out as a case by a longshoreman against American Mail for a second bite in the apple, and the intervenors had an interest here on this compensation. In this case if it is a question of handling the compensation, the pretrial order shows that under the Act and under the policy they are entitled to handle this compensation payment the way they contend and the way we contend. I am certainly going to object to any evidence of any other agreement between the parties, and if there is an agreement it is not for this Court to be concerned with. It is for Fireman's Fund and American Mail Line to honor, and if they don't honor it to sue or to seek declaratory relief."
>
> "I am defending a very serious case here by a longshoreman against the American Mail Line, and I don't think we should be getting into all of these collateral matters, especially as to some

1007 (1967). In that case this Court approved the deduction from a longshoreman's recovery that which was paid to him by way of compensation benefits and refused to include in such recovery medical expenses not incurred by the longshoreman.

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However, a more involved windfall argument is made by Fireman's Fund in respect to American Mail and its P & I insurance carrier. It appears that the first $10,000.00 of McDowell's $42,447.03 award was paid by American Mail and the balance by its P & I insurance carrier. The District Court denied repayment to Fireman's Fund of the $6,693.45 which it paid on behalf of American Mail for compensation and medical benefits because such was not included in McDowell's award.

Who of the three losers: American Mail, Fireman's Fund, or the P & I insurance carrier, gained a windfall? If the $6,693.45 "credit" was taken off the bottom of the $42,447.03 American Mail did not have to pay a full $10,000 and if taken off of the top, the P & I underwriter was saved paying what it would otherwise possibly have paid had American Mail been a third-party. However, there is another side of the coin. Had the matter been handled with American Mail as a third party, Fireman's Fund would have recouped its $6,693.45, but since American Mail was not in reality a third party it would be Fireman's Fund which gained a windfall to the full extent of its recoupment. Neither the Act nor the policy contemplated recoupment of money paid under the policy for American Mail or that recoupment could be had at the expense or detriment of its insured.

Moreover, if the P & I carrier's position is viewed as that of insuring American Mail as a third-party shipowner, we find it not gaining a windfall, but rather losing along with American Mail the right to be indemnified under *Ryan* by McDowell's employer. Since the Fireman's Fund policy insured American Mail as McDowell's employer, including any contractual right-over liability to a third person (Endorsement No. 12 to policy), Fireman's Fund would have written a check for the full $42,477.03 as well as defense expense. In short, in the case below the only one for certain who is gaining a very substantial windfall by the District Court following *Kanton*

is Fireman's Fund; the very person who is pointing its "windfall" fingers at others.

Nor, should the *dicta* in *Biggs* v. *Norfolk Dredging Company*, (4 Cir., 1966) 360 F.2d 360 persuade this Court to change its position in the *Kanton* case. We say *dicta* because the question as before this Court in *Kanton* was not before the Court of Appeals for the Fourth Circuit for decision. The *Biggs'* case was actually two consolidated appeals by workmen who had in different situations applied to state compensations commissions for compensation, claiming they were not seamen. Thereafter, each brought an action against their respective employers in the District Court claiming each was either a "Jones Act" or a "Sieracke" seaman. The District Court summarily dismissed both cases. The Court of Appeals reversed, holding that each workingman was not estopped by having made application for compensation from going to trial and establishing, if he could, his actual seaman status. It was only in such context that the Court, in order to show no incompatability between the compensation scheme and court action, observed how the problem of compensation payments *might* be handled. The Court merely stated that *if* the workingmen were successful in their litigation the defendant in each case "may retain from the judgment the sums necessary to reimburse the compensation carrier." No holding was made to require the matter to be handled as suggested.

This Court should adhere to its *Kanton* decision

and leave the insurance companies exactly where their carefully drafted insurance policies place them. They are thoroughly capable through policy endorsements or the adjustment of premiums to take care of themselves and make equitable contractual arrangements in light of *Kanton.*

District Court did not err in rejecting testimony of oral agreement; its findings that such was too indefinite, varied terms of the policy and beyond issues was not clearly erroneous.

Over objection of American Mail, Mr. Libby of Fireman's Fund testified that there was an agreement between American Mail and the Fireman's Fund that "these YAKA cases" would be handled the same as a third party case (Tr. 12, 14). The District Court's findings of fact that: (1) such alleged agreement was too indefinite to be enforceable; (2) would tend to change, modify or contradict the terms of the insurance policy; (3) could not be applicable to the specific policy; and (4) not properly the basis for the third party claim in intervention (R. 29) were supported by the evidence and were not clearly erroneous.

American Mail upon opening statement objected to the proof of an oral agreement claiming surprise in view of such contention not being set forth in the pre-trial order and further that if such oral agreement existed it should be litigated in a separate action (Tr. 7-8). It also objected to the evidence being admitted (Tr. 12).

As to this oral agreement no evidence was introduced to show between what individuals it was made, or when or where it was entered into. Further, it lacked certainty in that it failed to show how the parties had agreed, if at all, to handle any right-over for indemnity if American Mail was to be treated as a third party shipowner while the same American Mail was to be treated as McDowell's employer. These among other things made the evidence of the agreement too uncertain for enforcement.

The alleged oral agreement varied the term of the policy whose subrogation clause coupled with Section 33 of the Act (28 U.S.C.A. § 933) authorized recoupment through subrogation which could only be had against persons other than the insured.

The alleged oral agreement appears to have been made before the present policy was written, although it is vague in this respect. If so, it could not affect the present written policy which would have superseded any prior understandings. Of significance here is that Endorsement No. 12 to the policy (R. 14, Ex. 1) was an undertaking in writing to interpret and clarify a portion of the policy. If any oral agreement had previously existed it should have been incorporated into the policy while Endorsement No. 12 was in the making. Upon the offer of proof, Mr. Libby conceded such could have been done but was not done (Tr. 24).

The most that Fireman's Fund "Agreement" contention (p. 12) in its brief establishes is that its in-

itial "Intervention" contention (p. 6) is found wanting in merit. Neither the Act nor policy established American Mail as a third party. Likewise, Fireman's Fund failed to establish such status for American Mail by an oral agreement.

On this appeal American Mail takes the same position as it did at the trial. On opening statement its counsel stated (Tr. 7):

> ". . . I see nothing in the insurance policies which have been exhibited that there is some agreement. My answer to that is that if there is an agreement it is something that American Mail Line will honor just as much as Fireman's Fund will honor, but it has no place in this case."
>
> "This started out as a case by a longshoreman against American Mail for a second bite in the apple, and the intervenors had an interest here on this compensation. In this case if it is a question of handling the compensation, the pretrial order shows that under the Act and under the policy they are entitled to handle this compensation payment the way they contend and the way we contend. I am certainly going to object to any evidence of any other agreement between the parties, and if there is an agreement it is not for this Court to be concerned with. It is for Fireman's Fund and American Mail Line to honor, and if they don't honor it to sue or to seek declaratory relief."
>
> "I am defending a very serious case here by a longshoreman against the American Mail Line, and I don't think we should be getting into all of these collateral matters, especially as to some

agreement which I don't know anything of at this moment."

Contrary to Fireman's Fund the District Court did not "rescind" its intervention but rather gave Fireman's Fund its full day in Court. The District Court did not abuse its discretion in dismissing the petition and denying Fireman's Fund's claim after giving it a full day in court.

Respectfully submitted,

William F. White
White, Sutherland & Gilbertson
1200 Jackson Tower
Portland, Oregon
Attorneys for Appellee,
American Mail Line, Ltd.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William F. White
Attorney for Appellee

No. 22240

United States
COURT OF APPEALS
for the Ninth Circuit

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Plaintiff-Appellant,

v.

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Defendant-Appellee,

FIREMAN'S FUND INSURANCE COMPANY,

Intervenor-Appellant.

REPLY BRIEF OF APPELLANT FIREMAN'S FUND INSURANCE CO.

Appeal from the United States District Court of the District of Oregon

HONORABLE JOHN F. KILKENNY, District Judge

GRAY, FREDRICKSON & HEATH
LLOYD W. WEISENSEE, Esq.
Commonwealth Bldg., Portland, Oregon 97204
Attorneys for Intervenor-Appellant Fireman's Fund Insurance Company

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-68

FILED
JAN 15 1968
WM. B. LUCK, CLERK

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Intervention

The Appellee's Brief (pages 5-15) is mainly concerned with avoiding the application of the rules in the usual third party case to this case.

It is obvious that the only real party in interest on the appellee's side is the P & I (liability) carrier. The P & I carrier seeks to hide behind its insured. It offered no evidence in support of its pretrial contentions 4 and 7 (R. 19); furthermore, it never produced its policy. The P & I carrier now asserts (Br. 13) that if Fireman's Fund is given relief, then the P & I carrier should be awarded indemnity a-la *Ryan*. *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.* (1956), 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133. This claim was not made below and it can be nothing more than an afterthought calculated to confuse the issues before this Court.[1]

The Agreement

Appellee (Br. 15) seeks affirmance of the District Court findings regarding the agreement on two grounds: (1) uncertainty of terms providing for reimbursement; and, (2) surprise.

The District Court originally allowed the testimony under Rule 43 (c) F.R.C.P. relating to offers of proof. The reviewing court can consider the testimony even if disregarded by the lower court. *F. H. McGraw & Co.* v. *Milcor Steel Co.*, 149 F.2d 301, 306 (C.C.A. 2, 1945).

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[1] Appellee urges that Endorsement 12 of the policy would make Fireman's Fund liable on an indemnity claim. This, of course, is erroneous as Endorsement 12 of the policy provides coverage for negligence, not, as now asserted in the P & I carrier's behalf, coverage for the contractual liability arising out of a breach of the warranty of workmanlike service.

The proffered testimony of Mr. Libby was sufficient to prove the point sought to be established by Fireman's Fund, to-wit: there was an arrangement that Fireman's Fund would be reimbursed in the event of a direct suit by the injured employee against American Mail Line.

An offer of proof need only be sufficient to permit the court to rule intelligently on the propriety of the offered evidence. *Downey* v. *Traveler's Inn*, 243 Or. 206, 211, 412 P.2d 359, 362 (1966). There were no objections at the trial as to the form of the questions or answers, no questions on cross-examination as to any of the issues now raised as to the names of individuals, the exact dates or places of the agreement.

The appellee could hardy claim surprise (Br. 15) or that it was unaware of the agreement or practice sought to be proven by Fireman's Fund. Counsel for appellee did not do his homework either in engaging in discovery or interviewing American Mail Line personnel or the P & I carrier's personnel. The agreement was indisputably made and followed. No evidence to the contrary was presented. Appellee alleged there was no intention that Fireman's Fund be reimbursed but offered no evidence in support of its allegations regarding the intention of the parties.

CONCLUSION

No logical reason has been advanced for giving the P & I carrier the benefit of the money paid by Fireman's Fund.

Respectfully submitted,

GRAY, FREDRICKSON & HEATH
LLOYD W. WEISENSEE
Attorneys for Fireman's Fund
Insurance Company

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LLOYD W. WEISENSEE
Attorney